INTERNATIONAL TRADING CO. v. CHAN CHOW KIAN

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X.63 of 1969]

Contract — Agency — Onus of proof — Holding out by agent — Sale of goods — Non-payment by buyer — Refusal of further sales by wholesaler.

Agency — Alleged agency based on letter of appointment written by agent — Principal denying agent's authority.

This was an appeal against the dismissal by Abdul Aziz J. ([1969] 2 M.L.J. 223) of the appellants' counterclaim which alleged that the respondent by unilaterally terminating their appointment as sole distributors of respondent's products without cause was in breach of a contract for which he was liable in damages. On appeal there were two main issues: (1) the agreement they relied upon, and (2) breach of contract.

Held, dismissing the appeal: (1) the onus is on the person to prove the agreement he was relying upon. In this case on the facts, the appointment was made, not by the wholesaler, but by his agent who was a salesman, whose authority to do so was denied by his employer. What such agent represented as to the nature and extent of his authority was not binding on his principal;

(2) where there is no firm agreement which binds the vendor in definite terms to supply goods to a purchaser at a price certain over a stipulated period the vendor is entitled to refuse to deal with the purchaser who has been in breach of his obligation to pay for goods already sold and delivered;

(3) in this case as the customer having been given notice that he would not be supplied any more goods on credit unless overdue bills were first settled, and he refusing to pay, it was he, and not the vendor who was in breach of contract.

Cases referred to:-

(1) *Scammell* v. *Ouston* [1941] A.C. 251, 255.

(2) *Hillas & Co.* v. *Acros Ltd.* (1932) 147 L.T. 503.

(3) *Attorney-General for Ceylon* v. *A.D. Silva* [1953] A.C. 461, 479.

(4) *Withers* v. *Reynolds* (1831) 2 B. & Ad. 882; 109 E.R. 1370.

(5) *Martin* v. *Stout* [1925] A.C. 359, 363-4.

FEDERAL COURT.

Harry Elias for the appellants.

Cheng Tim Pin for the respondent.

Cur. Adv. Vult.

Ong C.J.: The parties to this appeal are dealers in imported merchandise. Chan Chow Kian, the respondent, is a wholesaler and sole proprietor of Fen Brothers Co., whose head office is in Singapore, with a branch in Kuala Lumpur. International Trading Company is the name under which Ng Boon Lay, its sole proprietor, carries on business, dealing in the same lines of merchandise as Fen Brothers. Since about 1962 Ng had been ordering goods from Chan for distribution and resale by himself in various parts of Malaya.

On September 29, 1966 a writ was issued by Chan out of the High Court in Kuala Lumpur claiming the sum of $22,148.91 as the balance due by Ng for goods sold and delivered. Ng admitted liability, save as to a small sum in dispute. The claim was eventually disposed of and nothing turns on it for the purpose of this appeal. There was, however, a counterclaim by Ng, alleging that Chan by his authorised agent, the Kuala Lumpur branch manager, had on January 2, 1964 appointed Ng as sole distributor for certain lines of pens and cosmetics in the States of Malaya for a term of 5 years ending on December 31, 1968, and that the unilateral termination of such appointment by Chan in September 1966 without cause was a breach of contract for which he was liable in damages.

By his reply Chan denied that his employee in Kuala Lumpur was authorised to make the alleged appointment; he denied all knowledge of any letter to that effect and pleaded that he was, in any event, justified in terminating the appointment by reason of the other party's breach of contract in failing to pay for goods supplied at the end of the agreed term of credit.

The learned trial judge held that on the evidence — though he did not specify what such evidence was — Chan had

> "held out Chia Chan Fun as the manager of the company in Kuala Lumpur and that he must have known of the appointment by his agent of the defendant as distributor.... Even if the plaintiff did not formally ratify the appointment, there is evidence to show that he had impliedly accepted the defendant as his agent for the purposes of distributing his products.... The letter of appointment has, in my view, the same effect as if it was signed by the plaintiff himself."

The judge, however, held that, by reason of the defendant Ng's admitted default in delaying payment for goods supplied over a period of more than 90 days, the plaintiff Chan was justified in refusing to supply any further goods on credit and terminating the agency. In the result the counterclaim was dismissed with costs.

This appeal was argued on various grounds, but since there are only two main issues and I shall deal with what are truly material to each issue I do not consider it necessary to refer to the grounds of complaint in detail.

In the first place, the onus is on Ng to prove the agreement he was relying upon. He produced a letter signed by Chan's Kuala Lumpur agent dated January 2, 1964, as follows: -

> "I take the pleasure to inform you that I CHIA CHAN FUN manager of M/s. Fen Brothers Co. Kuala Lumpur branch, hereby appoint your company M/s. International Trading Co., as the sole-distributor for Helen Neushaefer Cosmetics and Rotax Fountain and Ball Pens for the Federation of Malaya.
>
> This appointment is for a period of 5 years starting from the 1st January 1964 to the 31st December 1968.
>
> The above appointment is hereby made to M/s. International Trading Co., after their very successful sales of our product for the year 1963. I wish you the best of luck in handling our product and may your sales be increased day by day for the benefit of our houses."

I must say that, as an agreement, it was far from satisfactory. True, there was an appointment, but on what terms? The difficulties that have arisen in such cases were thus described by Viscount Maugham in *Scammell* v. *Ouston*[1]: -

> "It is a regrettable fact that there are few, if any, topics on which there seems to be a greater difference of judicial

opinion than those which relate to the question whether as the result of informal letters or like documents a binding contract has been arrived at. Many well known instances are to be found in the books, the last being that of *Hillas & Co.* v. *Acros. Ltd.*[2] The reason for these different conclusions is that laymen unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the *consensus ad idem* would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co.* v. *Acros. Ltd.*[2]"

In the instant case, fortunately, I am spared the vexatious duty of construing the contract or attempting to construct one by recourse to implied terms as tacitly agreed upon between the parties. The reason is that Ng's appointment was made, not by the wholesaler, but by his agent, whose authority to do so was denied by his employer. If the agent had no such authority, express or implied, then there is no necessity of any inquiry into the terms of the agreement by which he purported to bind the principal.

There was no finding by the judge that the agent Chia had actual authority to make the appointment — indeed, the reference to holding out makes it quite clear what the judge's view was. Accordingly the evidence must be examined to see if there was such holding out on the part of the principal. What Chia represented to Ng as to the nature and extent of his authority is wholly beside the point. As Mr. L.M.D. de Silva said, delivering the judgment of the Privy Council in *Attorney-General for Ceylon* v. *A. D. Silva*[3]: -

"All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal."

The learned trial judge merely stated his own conclusion, without referring to any specific evidence of alleged holding out by the principal. It now falls on me, therefore, to see whether in fact there was any such evidence. With respect, I must say that careful scrutiny of the record shows that the only representations as to Chia's authority were made by Chia himself — not, as the judge thought, by the principal. There was abundant evidence that Chia was in fact nothing more than an ordinary salesman, whatever else he might have represented himself to be. To quote Chia's own evidence:

"I was the only salesman; my salary as manager was $200 per month; as such I could not employ salesmen.... I was not provided with transport.... Mr. Chan knew of my dealings with defendant because for every sale we send copies of invoices to Singapore".

Knowledge of sales to any customer does not necessarily imply knowledge that such customer was a special agent.

Chia was not unaware that, if he did represent himself to Ng as having wide managerial powers, he was exceeding his authority. His letter of December 16, 1964 to his employer — nearly 12 months after he gave his so-called letter of appointment to Ng — contains these revealing passages: -

"I sincerely hope that in future, sometime you allow me to run the KL. office my way in order that I can have a chance to justify your trust and faith in making me as your KL. Manager.... Now, let me put you into the picture of the discussion that I have had with Mr. Ng. First I point out that there is a large amount which is long overdue. I also told him that we can only allow him a maximum term of 90 days only in future.... I hope you allow me to continue to do what I think is best, because I have a better picture of the situation over here. Please give me your full co-operation and understanding as before, because I have not failed you in any way except that M/s. Int. Trading Co. prolong their payments.... Please don't have the bad impression that I am paid by you and speak for Mr. Ng, because if I would not give you his point of view, how could you know the situation over here. I am preparing to do whatever I can for the good of your co., provided you give your co-operation and weapons. Another thing we discussed was the bank's guarantee. To this, he said it is not necessary, because if we can give him some sort of cash discount, he can arrange with his banker for the goods to be sent by 'Side Views' or cash condition, i.e. we give him the agency's right for the whole of Malaya together with an agency commissions, and with a small advertising allowance. I would suggest that you permit to do whatever I think is best until the middle of next month."

The penultimate sentence in the above letter clearly proves that Ng's letter of appointment given him on January 2, 1964 by Chia was wholly without Chan's knowledge or consent. On the first issue, therefore, I hold that the finding of the trial judge was wrong in law and contrary to the evidence. Accordingly Chan never bound himself to give Ng sole distributorship rights for 5 years or at all.

In the result, it necessarily follows that, on the second issue — breach of contract — the appellant Ng must also fail. He was in effect merely a customer of Chan's who was given credit facilities customarily granted to dealers. The correspondence produced in evidence shows that Chan had been pressing for settlement of bills overdue, at least since March 8, 1966, when Ng was given notice that "further extension of credit" could not be expected. On March 25, 1966 he was requested to settle his account "in one week's time from today's date". On August 25, 1966 Chan wrote to Ng as follows: -

"Re: Settlement of your Bills — due in April & May

We are surprised to learn from our Kuala Lumpur branch manager that you will refuse to make your payment unless we supply you further goods. This is indeed a very unbusinesslike attitude.

As you will appreciate, it is only fair of us to urge you for payment when your bills are due.

Therefore, we trust you will understand our position and let us have a definite date as to when you will be making your payment to us."

The next letter dated September 2, 1966 from Ng to Chan showed that he clearly understood his positions: -

"We are disappointed but not surprised to learn from your Kuala Lumpur new manager, that you have suddenly decided not to do further business with us. As this is the case, we

must inform you that before we can arrange to settle your bills by instalments, will you please confirm by return post, at the earliest possible date, your Kuala Lumpur manager's statement that your company do not wish to have further dealing with us, and that we are not agent for your goods any more.

In the event that if we failed to receive a reply within seven (7) days from the date of this letter we will treat it that you have given your confirmation as such."

Where there is no firm agreement which binds the vendor in definite terms to supply goods to another at a price certain over a stipulated period, I fail to see how the former should not be at liberty to refuse to deal further with a customer who has been in breach of his obligation to pay for goods already sold and delivered. No authority is needed in support of this proposition. Here, moreover, the customer had been given notice that he would not be supplied any more goods on credit unless overdue bills were first settled. He refused to pay unless he was supplied more goods on credit. He had no such right by agreement. It is therefore clear that he and not the other party was in breach of contract: see *Withers* v. *Reynolds*[4] and *Martin* v. *Stout*.[5]

For the above reasons I would dismiss this appeal with costs.

Gill and Ali F.JJ. concurred.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Lim Beng Cheang & Co.*

APPUHAMY v. DATO' AJIT SINGH

[FC. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X66 of 1969]

Master and Servant — Contract of employment — Implied term — Claim for salary during incapacity from illness — Retirement benefit — Collective agreement — Collective agreement not binding on workman not member of union.

Industrial Law — Salary during incapacity — Retirement benefit — Collective agreement with trade union — Workman not member of trade union — Whether employer ought to pay such retirement benefit.

The appellant had been employed as a master cutter in the tailoring department of Gian Singh & Co. for over 40 years. In 1965 he fell ill and was in hospital from June to November. On February 23, 1966 he retired from the respondent's services by mutual consent. The employers had entered into a collective agreement with a trade union of their employees and this provided for payment of salary during illness, medical expenses and retiring benefits. The appellant was not a member of the trade union. The appellant had not been given any notice terminating his service and he had not been paid any salary since July 1965. He claimed, *inter alia*, 8 months' unpaid salary and compensation upon his retirement. His claim was dismissed in the High Court and he appealed to the Federal Court.

Held, allowing the appeal: (1) in the circumstances of the present case there was no term express or implied that no salary was payable during incapacity and therefore the respondent was liable to pay the appellant his salary during his absence from work through illness, so long as the contract is not determined by proper notice;

(2) in the circumstances of this case an implied term could be inferred to pay a reasonable sum on retirement and as the respondent in this case had entered into a collective agreement with his employees to pay such retirement benefit, he ought to pay the respondent a retirement benefit on a scale not less than that set out in the collective agreement.

Cases referred to:-

(1) *Blay* v. *Pollard* [1930] 1 K.B. 628.

(2) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218.

(3) *Orman* v. *Saville Sportswear Ltd.* [1960] 1 W.L.R. 1055, 1964-5.

(4) *O'Grady* v. *M. Saper Ltd.* [1940] 2 K.B. 469.

(5) *Petrie* v. *Mac Fisheries Ltd.* [1940] 1 K.B. 258.

(6) *Reigate* v. *Union Manufacturing Co.* [1918] 1 K.B. 592, 605.

FEDERAL COURT.

Richard Talalla for the appellant.

Dato' Athi Nahappan for the respondent.

Cur. Adv. Vult.

Ong C.J.: The appellant, a master cutter in the tailoring department of Gian Singh & Company, had been in the service of the respondent's late father and then the respondent for almost two score years, since 1926. He is now 68. He had two short spells of illness in 1960 and 1963 during which he was paid his full salary. On June 12, 1965 he suffered from angina pectoris and diabetes and was admitted into hospital. Except for short breaks he remained there till November 1965. After his discharge he went in December to see the respondent about resumption of his duties. As a result of what took place he continued to stay away from work until February 23, 1966 when he retired from the respondent's service by mutual consent. Prior thereto he had not been given any notice terminating his employment. He had not been paid any salary since July 1, 1965. A claim for retirement benefits being rejected by his former employer, the appellant issued a writ on June 29, 1966 claiming *inter alia* eight months' unpaid salary at $600 per month and compensation upon his retirement. His claim was dismissed by the judge and he now appeals to this court.

The decision of the learned trial judge turned solely on a question of fact. After setting out the circumstances leading to the appellant's retirement the judge said:

"If those were the only facts of the case, it would be fairly simple to come to a decision on the claim, but at the beginning of 1963 a new element was introduced affecting the terms and conditions of service of all the employees of the firm. The evidence shows that the employees of the firm formed themselves into a union of employees which became affiliated to the National Union of Commercial Workers. The plaintiff was one of the members of the employees' union during its inception and was apparently instrumental in getting the union and the management to agree to negotiate new terms and conditions of service for the employees. On 30th January 1963, the Union and the company signed a collective agreement which stipulated *inter alia*, for salary during the period of illness, medical expenses and retiring benefits. The plaintiff was apparently not satisfied with the terms negotiated by the union and as a result he ceased to be a member of the union and had consistently refused to